Appl. No. 10/516,474
Response dated Feb 16 , 2007
Reply to Office action of December 19, 2006

REMARKS/ARGUMENTS

In response to the Examiner's Office Action of December 19, 2006, Applicants will herein present the following remarks:

The Examiner has rejected the previous claims 1-3, 5-9 under 35 USC103 (a) as unpatentable over Joffe (U.S. 6,185,619), in view of Attanasio (U.S. 5,918,017) in further view of Evans (A Communication-Ordererd Task Graph Allocation Algorithm UUCS-92-026, April 1992, page 1 – 25).

As will be noted Applicant has now provided an amended claim 1 which includes the features of the previous claims 2 – 4.

In regard to the Joffe reference cited by Examiner, it is noted that the Examiner has cited the Joffe reference in column 3 lines 44 – 63 and has indicated --- that Joffe forwards the transaction request to the "best server available" among a plurality of servers based on best metric value.

Examiner seems to consider that Joffe "suggests" (?) directing the transaction request the most idled server process.

This is certainly not the case and will be noted in the Joffe column 3 lines 42 – 67. Here it will be noted that Joffe states the following:

> Specifically the invention provides a system for routing requests for data objects from any number of clients based upon a "best server" routing policy to one of multiple content servers. Content servers serve data objects responsive to client's requests in view of one or more network access points, in accordance with a decision of a director. The director determines based upon the routing policy, the routing of said request for data objects to a particular content server ---.

Then Joffe in column 3 lines 64 onto column 4 lines 1 – 10, here Joffe states --- in accordance with a particular aspect of the invention, routing policies may comprise any of the following, a combination of any of the following or none of the following: (1) the least number of open TCT connections; (2) the most available free RAM; (3) the most available free SWAP (virtual memory); (4) the

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highest amount of CPU idled time; or (5) the fast ICMP rout to the client's
machine---.

It should be noted that this so-called "best server" routing policy does not
specifically address the situation as defined and posed by Applicants ---
that is to say --- the process of determining the idled server process that
most recently finished execution of a previous transaction, and then
forwarding the transaction request to the most recently idled process.

There is no specific teaching or information in Joffe that the execution of the transaction
request should go to the most recently idled process.

Joffe merely provides a generalized statement that the routing policy may comprise any
one of five different possibilities.

Further as seen in Applicant's newly-amended claim 1 which now combines aspects of
claims 2 – 4, here it will be noted that there is no overall teaching (in the cited references) of
each of the operations and sequences shown in the amended claim 1.

It is seen here that --- with the use of hindsight, the Examiner is picking and choosing bits
and pieces from various references in order to conglomerate these bits and pieces and try to
assemble the configuration and operation of Applicant's system and method.

It is improper to do so and there are many legal references, cases and decisions which
would indicate the impropriety of such a combination of reference elements which are used by
Examiner in order to evaluate the Applicant's configuration as being obvious.

Further, it has been noted that Joffe does not explicitly teach the forwarding of the
transaction request to a server process having a currently-opened connection, that is to say, a
connection that is not timed out since the last finished execution of a previous transaction. It is
at this point that then the Examiner, indicates the Attanasio reference --- saying that this function
is taught by Attanasio and that the use of Attanasio's function could easily be combined with
Joffe.

The Examiner states that the "motivation would be, to maintain, in a gateway transaction,
processing software where the status of server processes include a connection table of the most

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recently finished execution of the previous transaction in a dynamic connection table maintaining the status of the server processes".

Examiner's references to Joffe at column 9 lines 27 – 39, column 9 lines 40 – 59, column 11 line 65, column 9 line 14 plus Attanasio column 5 lines 2 – 13, column 10 lines 25 – 50, and additionally Joffe column 4 lines 49 – 67 --- provided Examiner with the conclusion that neither Joffe nor Attanasio teach using the most recently idled processor .

Then Examiner jumps to cite another reference, the reference to Evans which lists a scheduling algorithm that creates a priority queue of tasks to be performed plus a queue of idled processors arranged with a status queue that causes the most recently idled processor to be the processor selected for allocation (shown as page 9 of Evans).

Again Examiner cites that a skilled artisan would be motivated to use Evans in conjunction with Joffe and Attanasio.

Again Applicants would desire to reiterate that the Evans reference does not suggest the desirability for choosing the most recently idled processor.

Here Examiner argues that Evans has a desire to keep as many processors busy as possible and to reduce communication costs which must be treated against past length priorities. Then the Examiner contends that Evans has a stacked queue causing the most recently idled processor to be the processor selected for allocation on the basis that the task selected is the one that gives the maximum savings in communication time from the chosen processor.

These types of generalized statements do not fall within the bounds of Applicant's system for selecting the most recently idled processor. Applicant has no need for and does not require a combination of various policies as in Joffe nor does Applicant need for someone to act as a "director" as in Joffe.

Also it may be noted that page 9 of Evans, here Evans indicates:

PSET is a stack queue causing the most recently idled processor to be the processor selected for allocation. The heuristics select the task from a range of

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high priority tasks. ["Heuristics" denotes an approach to a solution by self-learning means]

But note page 4 of Evans at the Title of Precedent ordering (See Fig. 3) where:

Precedent ordering assigns a number to a task relative to the greatest completion time (or start time) of its precedent tasks for a particular program allocation. Tasks are numbered therefore in completion time (or start time) order. Precedent ordering satisfies the topological ordering requirements but also considers the processing time requirements of allocated tasks.

This listing of "greatest completion time" is not consistent with selecting the most recently idled processor. [The implication here is to select tasks needing "greater" completion times].

Evans says: — If a task is allocated to the same processor as one of its precedent tasks, then the communication costs between them is saved.

It should be pointed out that a statement saying "to one of its precedent tasks" — this does not teach or specify allocation to the "the most recently idled processor".

Evans does not suggest or teach the desirability of Applicant's overall claims. Further, Evans does not teach the desirability or motivation for choosing the most recently idled processor.

The mere fact that references can be combined or modified does not render the resultant combination obvious, unless the prior art also suggests that the desirability of the combination. See In re Mills, 916 F2nd, page 680; 16 USPQ2nd page 1430 (Federal Circuit 1990).

In the present status condition of the patent law, there are still certain legal requirements based on court decisions. For example, in the case of In Ray Fine, 837Federal2nd page 1071, 1074; also 5 USPQ2nd pages 1596, 1598-99 (Federal Circuit 1988): —

Here it was stated — before the PTO may combine the disclosure of two or more prior art references in order to establish prima facie obviousness, there must be some suggestion for doing so.

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> The court further stated --- the prior art must provide one of
> ordinary skill in the art the motivation to make the proposed
> molecular modifications needed to arrive at the claimed compound
> (at page 1944).

Additionally it is seen courts have indicated that --- even if the prior art may be modified
as suggested by the Examiner, the modification is not obvious unless the prior art suggests the
desirability for the modification, as for example in the decision In re Fritch, 922Fed2nd page
1260; 23 USPQ2nd 1780 (Federal Circuit 1992 where the Court held:

> Mere fact that prior art may be modified to reflect features of claimed invention
> does not make modification, and hence claimed invention obvious unless
> desirability of such modification is suggested by prior art...(at page 1780).

Further the case of In re Gordon, 733Federal2nd at page 902; 221 USPQ at page 1127
where it was stated ---

> The mere fact that the prior art may be modified in the manner suggested by the
> Examiner does not make the modification obvious unless the prior art suggested
> the desirability of the modification.

As a further note it was recently set forth that the "motivating suggestion" must be
explicit as was decided in the case of Winner International Royalty Corporation v.Wang, No. 96-
2107; 48 USPQ2nd, page 1139 (District Court DC 1998) where the court held:

> ...invention cannot be found obvious unless there was some explicit teaching or
> suggestion in the art to motivate one of ordinary skill to combine elements so as
> to create the same invention (at page 1140).
> ...there must have been some explicit teaching or suggestion in the art to motivate
> one of even ordinary skill to combine such elements so as to create the same
> invention (at page 1144).

To add further to the legal thinking in this situation, a recent decision of the Board of
Appeals and Interferences (In re Kahn, Fed. Cir. No.04-0616, 3/22/06), this case indicated that --

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> an obviousness rejection must <u>articulate the motivation, suggestion</u> <u>or teaching</u> that would have led the skilled artisan at the time of invention to combine prior art elements to make the claimed invention. (underlines added).

This case of <u>In re Kahn</u> indicated that --- absent such an explanation (reason for motivation) we infer, said the Court, that the Board used <u>hindsight</u> to conclude that the invention was obvious.

> In this <u>Kahn</u> case, the Court further said --- to establish a prima facie case of obviousness based on a combination of prior art elements, the board must <u>articulate the basis on which it concludes</u> it would have been obvious to make the claimed invention --- when the Board does not explain the motivation, the suggestion, or the teaching, --- that would of lead the skilled artisan at the time of the invention to the claimed invention as a whole, we infer that the board used <u>hindsight</u> to conclude that the invention was obvious.

Thus, it is incumbent upon the Examiner to present some <u>evidence or reason why</u> <u>the Attanasio and Evans</u> references could or should be combined with the Joffe reference, and what exactly would be the reason or motivation be for making such a combinative step? It is not sufficient that Examiner conceive a motivation without some <u>suggestion in the cited references</u> that such a combination would be desirable.

While much consideration is being given today as to the parameters and judgmental activity on the subject of motivation and the combination of references --- as the law and court decisions presently stand, there is a requirement for motivation and that there must be some suggestion in a basic patent reference which would suggest or indicate that some other reference could be combined with that technology in order to improve it. Absent such a suggestion and absent such motivation, it is improper to take various bits and pieces of references and combine them with the use of hindsight in order to apply this hindsight toward the Applicant's invention.

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With the presently-amended claims and with the present status of the law in regard to combining references and requiring motivation and suggestion in the references, it is respectfully requested that the present status of the law in patents be applied in this case and that the claims be considered as a whole in their entirety.

In this regard it is respectfully requested that the Examiner consider Applicant's method and system sufficiently novel to subsequently provide a timely Notice of Allowance.

Respectfully submitted,
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